MEMBER ALERT

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US SUPREME COURT DECISION SENDS RIPPLES THROUGH CHARTER PARTY CHAINS

Last week, the United States Supreme Court issued its long-anticipated decision in *CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*("ATHOS I"). In a 7-2 majority opinion, authored by Justice Sotomayor, the Court interpreted a charter party on the ASBATANKVOY form and held that a "safe-berth clause is a warranty of safety, imposing liability for an unsafe berth regardless of [the charterer's] diligence in selecting the berth," affirming the decision of the Third Circuit Court of Appeals. In a dissenting opinion, Justice Thomas, joined by Justice Alito, would have held that the plain language of the safe-berth clause at issue contained no warranty of safety.

The issue before the Court was, "where a charter agreement contains a 'safe berth' clause, which provides that the charterer will designate a safe port as the vessel's destination, is the safe berth clause a warranty for the ship's safety or a promise that the charterer will exercise due diligence in selecting a safe port?" In ruling that a charterer warrants the safety of the berth, the Supreme Court resolved the circuit split by following the view prevailing in the Second and Third Circuits and rejected the Fifth Circuit's approach that the safe-berth clause imposes merely an obligation of due diligence upon the charterer in selecting a safe berth. In so holding, the Court primarily relied on the "unqualified" language of the safe-berth clause in the charter party at hand and concluded that "the charterer's duty is absolute: The charterer must designate a berth that is 'safe' and that allows the vessel to come and go 'always' safely afloat." According to the majority, "[t]hat absolute duty amounts to a warranty of safety."

The majority and dissenting opinions recognize that the Supreme Court's decision applies to the particular charter party at issue and that contracting parties can negotiate different agreements. The key takeaway from the ATHOS I decision is that if the parties wish to adopt a due-diligence standard with regard to the safe-port/berth obligation in the charter party, they must explicitly state so (and many charter party forms do). Conversely, if the charter party includes a safe-berth clause without more, it shall be interpreted, under US law, to impose an absolute warranty of safety on the charterer. In the words of the Court, "Charterers remain free to contract around unqualified language that would otherwise establish a warranty of safety, by expressly limiting the extent of their obligations or liability."

From an Owner's perspective, the ATHOS I allows reliance as a third-party beneficiary to the terms of a charter party that the Owner may not be a party. This benefit of relying on another down-the-line charter party's language is a windfall for Owners. In general, parties in the chain of charters must be (or become) aware of "safe berth" provisions in any charter party subsequently made in that chain, and should take steps via amended language or otherwise to prevent the unexpected application of liability concepts that may be at odds with the charter party which a party has actually signed.

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To ensure limited or restricted liability, a Charterer should either select a charter party form that so provides (for example, BPVoy5), or request inclusion of a clause that explicitly states the Charterer is merely required to exercise due diligence to verify the port is safe before its nomination.

For more information relating to the ATHOS I decision and its effect on charter party language please feel free to reach out to the Association's FD&D departments in New York, Houston, London, Athens, Hong Kong and Shanghai.